

# RAMLI BIN ZAKARIA & ORS. v. GOVERNMENT OF MALAYSIA

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Abdul Hamid F.J.) June 6 & August 12, 1982]  
[Kota Bharu — Federal Court Civil Appeal No. 182 of 1981]

*Contract — Agreement for teacher training — Condition that after training teacher would be placed on UTS Scale — Abolition of UTS on coming into force of Abdul Aziz Scheme — Whether contract frustrated — Contract capable of being performed — No fundamental or radical change in circumstances — Contracts Act, 1950, s. 57(2).*

*Education — Abolition of UTS Scale — Abdul Aziz Scheme.*

In this case the appellants were a group of 86 vocational school teachers who were successful in their application for teacher training. One of the conditions of the offer which was accepted was that the teachers would on completion of the course be accepted as teachers on the UTS scale. By the time they completed their course of training the UTS scale had been abolished and the Abdul Aziz scheme came into force.

The appellants were offered salaries under the Abdul Aziz scheme. The appellants claimed that they should have been paid salaries and allowances under the UTS scheme. The respondent pleaded that as the recruitment of teachers into the UTS had been discontinued the offer to employ them under the UTS had become frustrated. The learned trial judge dismissed the claim of the appellants and they appealed to the Federal Court.

**Held:** (1) where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration;

(2) in this case it is wrong to say that the contract was not capable of being performed and it was not therefore frustrated. On the acceptance of the Abdul Aziz recommendations the Government put into force an improved salary scale and this was applicable to the appellants. Thus the UTS was abolished and ceased to apply to the appellants. After that the appellants were given a higher commencing salary and a more favourable scale than that of UTS.

## Cases referred to:

- (1) *C.B. Reilly v. The King* [1934] A.C. 176.
- (2) *Thambipillai v. Government of Malaysia* [1969] 2 M.L.J. 206.
- (3) *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corp. Ltd.* [1942] A.C. 154.
- (4) *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.* [1935] A.C. 524.
- (5) *Davis Contractors Ltd. v. Fareham U.D.C.* [1956] A.C. 696, 720-721, 723, 729.
- (6) *Parkinson (Sir Lindsay) & Co. Ltd. v. Commissioner of Works* [1949] 2 K.B. 632.
- (7) *Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH* [1962] A.C. 93, 118, 119.

## A HIGH COURT.

*A. Gomez* for the plaintiffs.

*Dato Haji Abu Mansor bin Ali* (Senior Federal Counsel) for the defendant.

- B** Mohamed Zahir J.: The plaintiffs, some 86 Vocational School Teachers, are claiming against the defendant for a declaration that they should have been paid salaries and allowances in accordance with the salary scales for Unified Teachers Scheme (UTS) as it existed on May 1, 1969 under an agreement between the parties dated May 1, 1969 (AB5-8).

- C** The plaintiffs also plead that accompanying this agreement before it was signed there was a letter of offer (AB1, 2 & 3) to every plaintiff and under paragraph 3(b) of this letter of offer there was the alleged undertaking by the defendant to employ the plaintiffs under UTS.

- E** The plaintiffs further plead that upon successful completion of their course they were employed under the Aziz scale with a starting salary of \$230, lower than UTS which was \$310 for men and \$275 for women. Eventually under letter *Perlantikan Kejawatan Sementara* dated September 21, 1972 (AB27-28), the defendant offered the plaintiffs a new scale with a starting salary of \$370 which is still lower than that if they were first placed under UTS and then opted into Aziz scales.

- G** In his written submission the plaintiffs' counsel stated that after two years of training the plaintiffs were asked to do an extra year of special training. Others in the same batch who were employed straight away after the two year course were put under UTS and who, after coming into force the Aziz scale, opted into this new scale with a salary of \$460, higher than the salary of the plaintiffs who passed out after an extra year of specialist qualification. They were further categorised as T2 teachers instead of T3 as their colleagues. The plaintiffs petitioned before bringing this suit to the defendant (AB22). The defendant's reply (AB25) was merely that the appointment of officers in the Education service from the date of Circular No. 10/71 was in accordance with that circular and refused to consider the petition favourably.

The defendant whilst admitting the letter of offer to the extent of conceding that paragraph 3(b) of the letter of offer was intended to refer to UTS, pleaded that the agreement (AB5-8) cannot be read subject to the letter of offer.

The defendant further pleaded that recruitment of teachers into UTS had been discontinued as from December 15, 1971, the offer to employ them under the UTS has become frustrated.

The defendant further pleaded that as on April 1, 1972 the plaintiffs were placed on attachment as they had not successfully completed their course of training and consequently each of them was paid attachment allowance of \$230 per month and further pleaded that the plaintiffs having completed their course on June 1, 1972 accepted the defendant's offer of employment as temporary teachers without reservation and were paid salaries in accordance with the terms and conditions of their employment in compliance with Service Circular No. 10/1971. However, the defendant did not plead waiver or estoppel.

The defence also pleaded that the agreement was not an employment agreement but that of awarding a course of teacher training with the sole obligation of the defendant that the plaintiffs be given proper training.

There was no evidence taken since almost all the material facts were agreed upon in AB or before me on the date of hearing. It was further agreed that the question of arrears of salaries payable by the defendant to the plaintiffs should the plaintiffs succeed in this Suit would be calculated by the defendant in the normal manner. This has saved a lot of time of the court and the parties. It is further agreed that the issue be narrowed down to whether the plaintiffs are entitled to be placed under the UTS.

The defendant's contention that the agreement (AB5-8) is merely for training and not for employment is, in my opinion, unsustainable. I am of the opinion it is an agreement to provide for both. Paragraph 1(c) of the said agreement reads as follows:—

"that the student will if required to do so by the Government at any time within twelve calendar months of the completion of the course serve the Government as a teacher in any post consistent with the qualifications obtained by the student to which the student may be appointed for a period of five years from the date of the completion of the course upon the terms and conditions for the time being applicable to such post and at a salary in accordance with the scales of salaries for the time being in force relating thereto."

It is clear that the defendant might not be obliged to employ the plaintiff because of the words: "that the student will if required to do so . . ." But if

A the defendant were to employ the plaintiffs then it would have to be upon the terms and conditions for the time being applicable to the post. If any of the plaintiffs refused to serve, he and/or his sureties are liable to be sued for damages. The discretion with the defendant is not to employ.

B As regards whether the letter of offer (AB1-3) formed part of the agreement or not, the defendant admits that in the letter of offer, the scale intended is the UTS. At the time of signing the agreement (May 1, 1969) UTS scale was still in existence. The Aziz scale came into force vide C Circular No. 10/71 dated December 15, 1971. Thus at the time of execution of the contract the *consensus ad idem* of both parties as regards the salary scales were the UTS. The question is this: can the defendant on their own volition alter the scale to one of different character than what was agreed before. Ordinarily, I do not think a party can do so. This is not the question of section 92 of the Evidence Act which is the exclusion of evidence of oral agreement. The letter of offer is a written document and it is not inconsistent with the Agreement at the time of signing. The UTS is still in existence although suspended.

However, in the instant case, where a Government is concerned there is substance in the defendant's plea that the contract cannot be fulfilled on account of frustration. The UTS upon coming into force of the Aziz Scheme has been suspended and from the date of Circular No. 10 of 1971 (December 15, 1971) which embodied the Aziz Scheme, it is stipulated under Clause 2 that teachers will only be recruited to the Education Service under the Scheme. This Aziz Scheme was adopted by the F Government and gazetted as a result of the Aziz Commission Report. The Commission was appointed by the Yang di-Pertuan Agong under the Commissions of Enquiry Act 1950 and gazetted in P.U.(B) 41 dated January 27, 1970 with the terms of reference generally to review the teachers' G salary. The Commission having completed their enquiry submitted their report and which was accepted by the Government in the form of Service Circular No. 10/1971 aforesaid. I am of the opinion that the contract between the parties has been frustrated. The defendant, like any other, cannot now legally place the plaintiffs under UTS. To do so would be illegal. In *C.B. Reilly v. The King*<sup>(1)</sup>, one Reilly was appointed to be a member of the Federal Appeal Board for a term of years. On May 30, 1930 the Canadian legislature passed an Act to amend the Pension Act and Reilly's office was abolished. His action for damages for H I

breach of contract was dismissed and it was held that "... if further performance of a contract becomes impossible by legislation having that effect the contract is discharged."

Thus, in the instant case, the defendant cannot within the law employ the plaintiffs under the UTS. So the contract is discharged.

The plaintiffs' counsel submitted that Circular 10/1971 did not apply to the plaintiffs who were then not yet Government servants. He quoted *Thambipillai v. The Government of Malaysia*<sup>(2)</sup> where it was held that a Circular Letter No. 6/1961 which was a mere expression of policy to raise the pension to 60 years was not binding on the Government. However, in the instant case it appears that Service Circular No. 10/1971 is promulgated under Article 132(2) of the Federal Constitution which reads as follows:

"(2) Except as otherwise expressly provided by this Constitution, the qualifications for appointment and conditions of service of persons in the public services other than those mentioned in paragraph (g) of Clause (1) may be regulated by federal law, by the Yang di Pertuan Agong ..."

Thus, it would appear that such conditions of appointment and conditions of service as embodied in the Service Circular No. 10/1971 have the force of law under which the Government may sue and be sued. This being the case, the plea of frustration of contract should prevail. The defendant cannot at the risk of acting illegally be in the position to engage the plaintiffs on other schemes except under the Aziz Scheme.

There is another aspect of looking into the whole matter. Supposing we consider that defendant is bound to pay the plaintiffs under the contract the UTS, then the defendant would have to pay them the initial salary of \$310 for men and \$275 for women. But they had been paid under the Aziz Scheme a higher salary of \$370 for both men and women. They became under the Aziz Scheme, Government servants with pension rights instead of formerly as supposed employees of the various School Boards which was rather illogical.

What the plaintiffs want is first to be placed under UTS and then opt into Aziz Scheme. But under rule 103 of the Service Circular No. 10/1971 the right to opt was given only to those who were employed before the coming into force of the Scheme. Those who were recruited under the Scheme are not in the position to opt as they are already in it. Further the right to opt is never en-

visaged in the agreement between the parties. They cannot reject the Aziz Scheme and apply for right of option under it at the same time.

I must admit there appears to be some anomaly as far as the position of the salaries of the plaintiffs. But I think they cannot obtain redress from the Court of Law and most probably the Salaries Tribunal is the proper venue to deal in this matter.

In the circumstances, I dismiss the plaintiffs' claim with costs.

[From the above judgment the plaintiffs appealed to the Federal Court.]

FEDERAL COURT.

A. Gomez for the appellants.

Dato Abu Mansor bin Ali (Senior Federal Counsel) for the respondent.

*Cur. Adv. Vult.*

Abdul Hamid F.J. (delivering the judgment of the Court): This appeal is against the decision of Mohamed Zahir J. (as he then was) dismissing the appellants' claim with costs.

The sole issue before the learned Judge was whether the appellants were entitled to be placed under the Unified Teachers salary scale (UTS).

The facts are not in dispute. The appellants are a group of 86 vocational school teachers who, in response to an advertisement in the local press, submitted their applications for teacher training and were successful. Letters of offer (surat tawaran) dated January 16, 1969 for teacher training were sent to them. One of the conditions stated in the letter of offer relates to the pay they would receive upon completion of the training. Each successful candidate had to complete a Form of Acceptance and sign a standard agreement.

Condition 3(b) in the letter of offer which is material for purposes of this case reads:

"3(b) *Sharat bayaran sa-lepas tammat latehan*

Sa-lepas tammat kursus DUA tahun dan sa-lepas lulus sa-kali lagi Pemereksaan Doktor, tuan/puan akan di-terima sabagai guru dalam Tingkatan Gaji Yang di-Persatukan dan di-undang mengikut sharat<sub>2</sub> Perkhidmatan bagi Peratoran Gaji Yang di-Persatukan itu. Tuan/Puan akan di-beri jawatan sabagai sa-orang guru oleh Lembaga Pengurus atau Lembaga Pengelola sekolah<sub>2</sub> yang berkenaan dan tidak akan di-anggap sabagai pekerja Kerajaan. Tuan/Puan juga di-haruskan boleh di-tempatkan di-mana<sub>2</sub> jajahan di-Tanah Melayu ini sa-lama lima tahun dari masa tammat latehan mengikut sharat<sub>2</sub> perjanjian tuan/puan dengan Kerajaan."

Translated it means "conditions of pay after the completion of the course – after the completion of two year course and on passing medical examination you will be accepted as a teacher on the UTS scale and shall abide by the service conditions relating thereto. You will be employed as a teacher by the relevant School Board of Governors or Management and shall not be treated as a civil servant."

One of the other conditions is that upon acceptance of the offer each appellant was to execute an agreement in five copies (p. 508 AB).

After the two year training the plaintiffs were asked to do an extra year specialist course of training. Upon graduation they were put on attachment on April 1, 1972 on a commencing salary of \$230 p.m., lower than UTS which was \$310 for men and \$275 for women. In this regard however it is to be observed that the appellants were placed on attachment as they had not then successfully completed their course of training. The payment of \$230 was merely an allowance. The date of completion of the course was June 6, 1972. By letter Perlantikan Kejawatan Sementara dated September 21, 1972 (AB27-28), the appellants were offered a new scale T2 under the Aziz Scheme with a starting salary of \$370. This according to the appellants would still be lower than the salary they would have got if they had been placed first under UTS and then opted into Aziz. The appellants claim that there was a breach of the agreement and pray for an order declaring that they are entitled to salaries and allowances in accordance with UTS as it existed on May 1, 1969.

It is clear that at the time the agreement was entered into between the appellants and the respondent the only salary scale in force relating to trained teachers applicable to the appellants was the UTS scale but on completion of the course of training the UTS was no longer in existence. The only salary scale in force then was the salary scale under the Aziz Scheme.

In this appeal the appellants rely on the following grounds:—

That the learned Judge erred in law and in fact in

- (1) upholding the respondent's plea that the contract could not be fulfilled on account of frustration and that it had been discharged.

- A (2) not accepting the submission of the appellants that Circular 10/1971 did not apply to the appellants who were then not yet Government servants.
- (3) not following the decision of *Thambipillai v. The Government of Malaysia*<sup>(2)</sup>.
- B (4) holding Service Circular 10/1971 as having the force of law at the material time.
- (5) ...
- (6) holding that rule 103 of Service Circular No. 10/1971 barred the appellants from being placed under the UTS scale.
- C

Before dealing with the merits of the appeal, we would observe that the Judge has held that the agreement (AB5-8) provided not only for training but also for employment. Reference was made to clause 1(c) thereof. We see no reason to disagree.

In our view the agreement has spelt out quite clearly that the employment was to be at the option of the respondent exercisable at any time within twelve calendar months of the completion of the course. A student required to serve was to be appointed upon terms and conditions for the time being applicable to the post and at a salary in accordance with the scales of salaries for the time being in force relating thereto. The words "for the time being in force relating thereto" used in clause 1(c) with reference to scales of salaries may in our view be construed to mean that the appellants were to be subject to whatever scales of salaries relating to the post of a trained teacher in force at the time of the employment. The Judge however ruled this out and held that in the light of the respondent's admission the scale intended was the UTS. The Judge also held that at the time of the execution of the contract the *consensus ad idem* of both parties as regards the salary scales related to the UTS and hence posed to himself this question: "Can the defendants of their own motion alter the scale to one of a different character from what was agreed before?"

Now, one of the respondent's defences in the court below was that the contract could not be fulfilled on account of frustration and the Judge found substance in this plea.

It is common ground that on the coming into force of the Aziz Scheme the UTS was abolished. The Aziz Scheme was embodied in Circular 10/1971 (December 15, 1971). It is stipulated under

para 2 of the circular that teachers will only be recruited to the Education Service under the scheme. The scheme was adopted by the Government upon acceptance of the report of the Aziz Commission appointed by the Yang di-Pertuan Agong under the Commission of Enquiry Act 1950 (P.U.(B) 41 – January 27, 1970) to review teachers' salaries. After due consideration the Judge concluded that the contract between the parties was frustrated. He further concluded that in consequence the respondent could not legally place the appellants under UTS and to do so would be illegal. Reference was made by the Judge to the case of *C.B. Reilly v. The King*<sup>(1)</sup> to support his finding that the respondent could not within the law employ the appellants under the UTS and the contract was therefore discharged.

The appellants have contended that there was no frustration of the contract. *C.B. Reilly's* case, they said, cannot apply to the present case. It is submitted that the UTS was not abolished but merely suspended and was therefore still in existence. The appellants have also contended that if there was to be a frustration of the contract it had to be such that the whole of the contract could not be performed. In this case, they maintained, it was possible to amend Circular 10/1971 to accommodate this group to enable performance of the contract.

The appellants' case was in substance founded on contract and to succeed in their claim fundamentally they have to establish that there was a breach of the contract. It is not in dispute that they accepted the offer and executed the agreement as required under para. (b) of the letter of offer and it is their contention that one of the terms of the contract was that they should be placed on UTS if on completion of their course they were required by the respondent to serve. The Judge quite rightly held that it was the parties' *consensus ad idem* that the scale intended was the UTS. What seems clear to our mind is that it was outside the contemplation of and unforeseen by the parties that the UTS would cease to be in force at the time of the appellants' employment. It is also clear that it was not in the minds of the parties that the UTS would be reviewed and substituted or replaced by another salary scheme as had happened in this particular case. In the present case the appellants are not questioning the Government's right to accept the recommendation of a salaries commission and to effect changes in the terms and conditions of any particular service. The question therefore is if another salary scale is substituted

A and such scale would cover the appellants should they, if required to serve, be not appointed upon the terms and conditions for the time being applicable to such post and at a salary in accordance with the scales of salaries for the time being in force relating thereto? We are not strictly concerned with the terms and conditions applicable to the post. They are not in issue. The sole issue here is the salary or rather the salary scale in particular the quantum. What we therefore have to consider is whether by reason of the substitution of the salary scale as set out in Service Circular 10/1971 consequent upon the acceptance by the Government of the Aziz Report it became impossible for the respondent to perform that part of its contractual obligation and that therefore the contract was discharged by frustration.

D Assuming there was in law frustration, then in that event the Judge was perfectly right in holding that the contract was discharged on ground of impossibility of performance. With respect we do not agree. We are inclined to think that there was no frustration and the reason is that it was capable of being performed. The relevant provision on the doctrine of frustration is set out under our Contracts Act, 1950 section 57(2) which reads:

E “(2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.”

F The introductory passage in a chapter dealing with discharge by frustration in ‘The Law of Contract in Malaysia and Singapore – Cases and Commentary’ by Visu Sinnadurai at p. 487/8 reads:

G “A contract is frustrated when there is a change in the circumstances which renders a contract legally or physically impossible of performance. According to the House of Lords in the case of *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corpn. Ltd.*<sup>(3)</sup> the doctrine ‘is only a special case of the discharge of contracts by an impossibility of performance arising after the contract was made.’ Section 57(2) of the Contracts Act, 1950 states the doctrine thus:

H A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

I The Act does not define the word ‘impossible’. However, it appears that the wording of the section envisages two main instances of frustration – when a contract to do an act becomes (a) impossible or (b) unlawful. It is clear that the frustration should be supervening and subsequent to the formation of the contract. Furthermore, it should be some

event which the promisor could not prevent, as a 'self-induced frustration' does not discharge a party of his contractual obligation (*Maritime National Fish Ltd. v. Ocean Trawlers Ltd.*<sup>(4)</sup>).

With reference to the present case, the question is whether the change in the salary scale rendered performance impossible. Before answering the question we would refer to the English law with regard to the proper test of frustration. The law on this point is succinctly set out in "*Chitty on Contracts – General Principles*" 24th Edition p. 658/9 as follows:

"In view of the decision of the House of Lords in *Davis Contractors Ltd. v. Fareham U.D.C.*<sup>(5)</sup> the proper test for frustration may be formulated as follows: If the literal words of the contract were to be enforced in the changed circumstances, would this involve fundamental or radical change from the obligation originally undertaken? In this case Lord Radcliffe said: "... frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do ... There must be ... such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

Lord Reid put the test for frustration in a similar way. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.' Later in his speech, he approved the words of Asquith L.J. that the question is whether the events alleged to frustrate the contract were 'fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply'. (*Parkinson (Sir Lindsay) & Co. Ltd. v. Commissioner of Works*<sup>(6)</sup>).

It would seem that the question is one of construction of the contract and in this regard we again refer to "*Chitty on Contracts*", same edition, at p. 659/60 where it is stated –

"Both Lords Reid and Radcliffe emphasised that the first step was to construe 'the terms which are in the contract read in the light of the nature of the contract, and of the relevant surrounding circumstances when the contract was made.' From this construction the court should reach an impression of the scope of the original obligation, that is, the court should ascertain what the parties would be required to do in order to fulfil their literal promises in the original circumstances. This impression will depend on the court's estimate of what performance would have required in time, labour, money and materials, if there had been no change in the circumstances existing at the time the contract was made. The court should then examine the situation existing after the occurrence of the event alleged to have frustrated the contract, and ascertain what would be the obligation of the parties if the words of the contract

were enforced in the new circumstances. Having discovered what was the original 'obligation' and what would be the new 'obligation' if the contract were still binding in the new circumstances, the last step in the process is for the court to compare the two obligations in order to decide whether the new obligation is a 'radical' or 'fundamental', change from the original obligation [see *per* Lord Reid in *Tsakiroglu & Co. Ltd. v. Noble Thorl GmbH*<sup>(7)</sup>]. It is not simply a question whether there has been a radical change in the circumstances, but whether there has been a radical change in the 'obligation' or the actual effect of the promises of the parties construed in the light of the new circumstances. Was 'performance ... fundamentally different in a commercial sense'?

Their Lordships also agreed that it is a matter of law for the court to construe the contract in the light of the facts existing at its formation and then 'to determine whether the ultimate situation ... is or is not within the scope of the contract so construed.' It is submitted that the House of Lords has accepted the view that the test for frustration is objective and that frustration is a matter of positive judicial intervention. It is not a subjective inquiry into the actual or presumed intentions of the parties, as was suggested by the older theory of the implied term, since the discharge of a contract on the ground of frustration occurs automatically upon the happening of the frustrating event, and does not depend upon any repudiation or other act of volition on the part of either party."

In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

Before we embark upon an inquiry whether, in view of the change of circumstances namely the substitution of a new salary scale under the Aziz Scheme and the abolition of the UTS, there was frustration of the contract, it is appropriate at this point to consider the merit of the appellants' contention that the respondent should not be allowed to rely on frustration if it itself created the frustration, that is, if it was a self-induced frustration. The appellants have alleged that the Government was the author of the Aziz Scheme and itself effected the abolition of the UTS. We are unable to see substance in this argument because in matters relating to qualifications for appointments and conditions of service the Government is the deciding authority and the power is provided by law. Such authority cannot be made subject to any agreement that may be entered into between the Government and another. Instead such agreement must be read subject to the authority by law conferred upon the Government. It is our view there-

fore that there was no question of any self-induced frustration. Basically the question remains whether in fact there was frustration of the contract. It is in this regard that the test laid down in *Davis Contractors*' case seems relevant. The test is an objective one to determine whether there has been a radical change in the actual effect of the promises of the parties construed in the light of the new circumstances.

As a first step in the enquiry we would consider the status of the Service Circular. It is to be observed that the Judge has said and we quote —

"The UTS upon coming into force of the Aziz Scheme has been suspended and from the date of Circular No. 10 of 1971 (December 13, 1971) which embodied the Aziz Scheme, it is stipulated under Clause 2 that teachers will only be recruited to the Education Service under the Scheme. This Aziz Scheme was adopted by the Government and gazetted as a result of the Aziz Commission report. The Commission was appointed by the Yang di-Pertuan Agong under the Commission of Enquiry Act 1950 and gazetted in P.U.(B) 41 dated January 27, 1970 with the terms of reference generally to review teachers' salary. The Commission having completed their enquiry submitted their report and which was accepted by the Government in the form of Service Circular No. 10/1971 aforesaid."

Clearly the Service Circular came to be issued after the Government had approved the Aziz Commission Recommendations. The Commission was an independent body established under an Act of Parliament and charged by law with specific terms of reference. One of its functions was to submit recommendations on salary schemes relating to teachers to form not only the basis of a revision of salaries of those in the service but also to provide terms and conditions of service and salary scales for new teachers.

In our view, the Judge made a correct finding of law when he held that the conditions of appointment and conditions of service as embodied in Service Circular No. 10/1971 had the force of law. The Judge made this finding in the light particularly of Article 132(2) of the Federal Constitution which empowers the Government to regulate the terms and conditions of persons in the public service. The introduction by the Government of a new salary scale cannot be said to have been effected with a view to denying the right, contractual or otherwise, of any particular person or group of persons. Neither was it the object of the respondent to escape performance of contractual obligation under any contract. The Government accepted the Aziz recommendations and in fact put into force an improved salary scale and it was applicable to the appellants. Thus the UTS was

A abolished and ceased to apply to the appellants. After that the appellants were given a higher commencing salary and a more favourable scale than that of the UTS.

B Our view is that it is wrong to say that the contract was not capable of being performed. It is also the appellants' contention that the contract was not frustrated and that the respondent could perform the contract but the respondent must amend Circular 10/1971 to accommodate them. We do not see the necessity to do that. The Circular was applicable to the appellants. We also see no merit in the appellants' contention that the Circular could not apply to them as throughout the Circular the word "employee" was used and they were not employees. Paragraph 3 of the Circular specifically provides that —

D "3. From the date of this Circular, recruitment of teachers into the existing 'Government Education and Teaching Services' and the 'Unified Teaching Service' shall be suspended and, thereafter, teachers will only be recruited to the Education Service referred to in paragraph 1 above, except that Missionary Teachers may continue to be employed in accordance with Regulation 24 of the Regulations for Aided English Schools in the Straits Settlements, 1936, and Regulation 23 of the Regulations for Aided English Schools in the Federated Malay States, 1936."

E And paragraph 1 of the Circular reads —

F "Following the recommendations of the Royal Commission on the Teaching Services, West Malaysia (the Aziz Commission), the Government has set up the 'Education Service'. The Education Service is an open service and its members, who will be known as 'Members of the Education Service' (hereinafter referred to as 'Members'), will be directable and deployable to perform teaching, administration or other duties that may be reasonably required of them."

G Paragraph 2 sets out the four categories of the education service and category T relates to the appellants. The salary scales are to be found on pages 61 and 62 of the Circular.

H Apart from paragraph 3 of the Circular which provides that "thereafter, teachers will only be recruited to the Education Service referred to in paragraph 1 above . . ." there is revealed that as from the date when the Circular came into force the intake of teachers to the teaching service would be in accordance with the terms and conditions and salary scales provided under the Circular. This is reinforced by the provisions which govern the terms such as "entry qualifications", "application", "probationary period" and so forth. These provisions clearly invalidate the appellants' contention that the appellants were not covered by Service Circular 10/1971. It is a fact that they

were eligible for direct intake under one of the categories provided thereunder. The appropriate category was T2.

As for *Thambipillai's* case we do not see how that decision could support the appellants' contention. In that case the learned Judge had regard to the nature and effect of that particular service circular when he held that the service circular was no more than a mere declaration of policy. The same cannot clearly be said of Service Circular 10 of 1971.

Paragraph 1 of the Service Circular reinforced by paragraphs 127 and 128 shows that the new terms and conditions of service as set out in the Circular supersede those rules and regulations which would cease to have effect and that steps were being taken to cancel and amend the relevant laws, circulars, orders and instructions to bring them in conformity with the terms of this circular.

The only remaining point raised by the appellants is that they should first be placed on UTS and then be allowed to opt to the salary scale under the Aziz Scheme. We are in sympathy with the appellants and we fully appreciate the anomaly they alleged has arisen, particularly where it affects the total emoluments compared to those who a year earlier were placed on UTS and later converted to the Aziz salary scale. This is something that does not come within the purview of the Judge to deal with. The Judge quite rightly confined himself to the appellants' claim as disclosed from the pleadings.

Moreover, we do not see how the appellants could on one hand claim that Circular 10/1971 is not applicable to them and on the other sought to be placed, or at any rate, to be allowed to opt into the Aziz scale.

For the above reasons, it is our judgment that the learned Judge had not erred in law and in fact in arriving at his decision. We ourselves have reached the same conclusion although for somewhat different reasons.

Accordingly we would dismiss this appeal with costs.

*Appeal dismissed.*

Solicitors: *A. Gomez & Co.*

**RE DATO BENTARA LUAR DECD.  
HAJI YAHYA BIN YUSOF & ANOR. v.  
HASSAN BIN OTHMAN & ANOR.**

[F.C. (Raja Azlan Shah C.J., Salleh Abas F.J. and Abdoolcader J.) July 9 and August 14, 1982]

[Kuala Lumpur — Federal Court Civil Appeal  
No. 146 of 1981]

*Islamic Law — Wakaf — Wakaf in favour of children and their issue — Whether valid — Dedication for religious purposes — Johore Wakaf Prohibition Act, 1911, ss. 3, 4 & 5 — Johore Administration of Islamic Law Enactment, 1978, s. 48.*

*Legal History — What was the law applicable in Johore in 1909 — Islamic Law in force — Fatwa of Mufti — Johore Courts Enactment, 1911 — Johore Courts Enactment, 1931 — Civil Law Enactment, 1937 — Civil Law (Extension) Ordinance, 1951.*

*English Law — When introduced into Johore — Johore Courts Enactment, 1911, ss. 28, 29 and 30 — Johore Courts Enactment, 1931, s. 74 — Civil Law Enactment 1937 — Civil Law (Extension) Ordinance 1951.*

In 1909 the late Dato Bentara Luar of Johore, Mohamed Salleh bin Perang, made a wakaf of a piece of land in favour of his two children Othman and Kalthom, and their issue forever. He died in 1915. At the time of his death the land was registered in his name. The appellants, the administrators *de bonis non* of the estate of the said Dato Bentara Luar claimed that the said wakaf was invalid and inoperative. The respondents, the children of the beneficiaries of the wakaf, claimed that the said wakaf was valid and counterclaimed for a declaration to that effect and for a vesting order of the land. Abdul Razak J. held that the wakaf was valid by virtue of the provisions of section 11 of the Wakaf Prohibition Enactment, 1911 and section 41 of the Administration of Islamic Law Enactment, 1978 — See [1981] 2 M.L.J. 352. The appellants appealed.

Held: (1) the law applicable to determine the validity of the wakaf in this case is the Islamic Law as interpreted by Muslim scholars learned in Islamic jurisprudence, unencumbered by the rule against perpetuity, a concept alien to that system of jurisprudence;

(2) the Privy Council decisions on wakaf do not apply because (i) the system of appeals to the Privy Council from the decisions of the courts in Johore was only introduced in 1920, (ii) at the time when the wakaf was created the law as interpreted by the Privy Council decisions was not yet part of the law of Johore and (iii) the application of the rule against perpetuity ever since it was introduced in the Malay States including Johore in 1937 has always been excepted by a saving clause to exclude disposals of Muslim properties according to Islamic Law from the operation of the rule;

(3) as the wakaf took effect immediately, the subsequent conduct of the Dato Bentara Luar did not disprove the existence of the wakaf nor did it affect its validity;

(4) the wakaf in this case was valid according to the Islamic Law applicable to Johore in 1919.